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VLADIMIR ZEMLYAKOV
9 GEORGIAN COURT
BASKING RIDGE NJ 07920

MAILED

AUG 13 2009

OFFICE OF PETITIONS

In re Application of :
Zemelyakov et al. :
Application Number: 10/017280 :
Filing Date: 12/07/2001 :
For: UPPER EXTREMITY :
EXOSKELETON STRUCTURE AND :
METHOD :

ON PETITION

This is a decision in reference to the letter filed on May 21, 2009, which is treated as a renewed petition to withdraw the holding of abandonment.

The petition is **DENIED**. This decision may be viewed as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02.

BACKGROUND

This application became abandoned on November 7, 2003, for failure to timely submit corrected drawings and respond to the examiner's amendment sent with the Notice of Allowability mailed on August 6, 2003, which set a three (3)-month statutory period for reply. Notice of Abandonment was mailed on June 3, 2004.

On June 21, 2004, a petition to withdraw the holding of abandonment was filed. On March 30, 2006, the petition was dismissed. On May 25, 2006, a renewed petition to withdraw the holding of abandonment was filed. On July 11, 2006, the petition was again dismissed. On September 7, 2006, a paper styled as a petition, signed by only one inventor, was filed, requesting withdrawal of the holding of abandonment. On November 14, 2006, a letter in response was mailed, stating the petition was again dismissed. On January 5, 2007, a renewed petition was filed.¹ A status letter was filed on February 17, 2009, along with a paper

¹ A status request was filed on October 17, 2007, and on February 17, 2009.

signed only by inventor Zemlyakov requesting that the correspondence address be changed. On March 25, 2009, the petition was again dismissed.

On May 21, 2009, the subject renewed petition was filed. In the subject renewed petition, petitioners assert:

1. Applicants had never stated, "a proper and timely response to the Interview Summary was in fact filed" by the Patent Office. Applicants had only stated that the Applicants' response including the drawings was sent on August 7, 2003 and received by the Patent Office. But the Applicants' response was not filed by the Patent Office in proper time because, unfortunately, the response to the Interview Summary was lost into the Patent Office. Applicants would like to note again that if the response was filed by the Patent Office in proper time it was not [sic] problem with failure to timely file corrected drawings.

2. The Office of Petitions in this letter states, "Petitioners' argument has been considered, but is not persuasive. Assuming, *arguendo*, the drawings filed with a certificate of mailing were timely filed, petitioners were notified in the decision on petition mailed on March 30, 2006, that the drawings are not in compliance with 37 CFR 1.84 and 1.152. As such, corrected drawings are required, and the application could not have issued as a patent using the drawings filed to date."

Applicants would like to remind [sic] again that corrected drawings, according to requirements of the Notice of Draftsperson's Patent Drawing Review contained in the decision on petition mailed on March 30, 2006, were filed by Patent Office on May 25, 2006. Because Applicants had not received after that any comments on corrected drawings from the Patent Office, the drawings are in compliance with 37 CFR 1.84 and 1.152, and the application can be issued as a patent.

3. Applicants would like to remind that correspondence address of Vladimir Zemlyakov that is prosecuting the application process was changed and filed by the Patent Office on February, 17. 2009. Please, use new correspondence address that is: 9 Georgian Court, Basking Ridge, N.J. 07920.

4. Applicants again have not found arguments to revive the Patent Application and pay additional fee. Applicants would like to repeat that the Patent Office has the drawings that are in compliance with 37 CFR 1.84 and 1.152, which were filed by the Patent Office on May 25, 2006.

LAW AND REGULATION

35 U.S.C. 133 states:

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable.

37 CFR 1.133(b) states:

In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply to Office actions as specified in §§ 1.111 and 1.135.

37 CFR 1.134 states:

An Office action will notify the applicant of any non-statutory or shortened statutory time period set for reply to an Office action. Unless the applicant is notified in writing that a reply is required in less than six months, a maximum period of six months is allowed.

37 CFR 1.135 states:

(a) If an applicant of a patent application fails to reply within the time period provided under § 1.134 and § 1.136, the application will become abandoned unless an Office action indicates otherwise.

(b) Prosecution of an application to save it from abandonment pursuant to paragraph (a) of this section must include such complete and proper reply as the condition of the application may require.

OPINION

Preliminarily, receipt of the paper titled as a "change of correspondence address" filed on February 17, 2009, is acknowledged. The request to change the correspondence address filed on February 17, 2009, cannot be entered, however, because it is not properly signed. Specifically, inventor Patrick McDonough's signature is missing from the request. 37 CFR 1.33(a)(2) requires that a change of correspondence address request be signed by all of the inventors or a registered patent practitioner. Nevertheless, as the subject petition contains a proper request to change the correspondence address, the address has been updated.

Petitioners essentially argue that the amendment, including drawings, which petitioners have shown was filed on August 7, 2003 (certificate of mailing date), sufficed as both a response to the non-final Office action mailed on July 16, 2003, and to the Interview Summary mailed on August 6, 2003, with the Notice of Allowability.

Petitioners' argument has been considered, but is not persuasive. Assuming, *arguendo*, that no new drawings were required as a result of the Interview Summary, the petitioners would be required nonetheless to file a statement of the substance of the interview unless otherwise directed in the Interview Summary.

In this regard, it is noted that the Interview Summary stated, in pertinent part:

THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW (See MPEP 713.04). **If a reply to the last Office action has already been filed, APPLICANT IS GIVEN ONE MONTH FROM THIS INTERVIEW DATE, OR THE MAILING OF THIS INTERVIEW SUMMARY, WHICHEVER IS LATER, TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW.**

(emphasis added)

The amendment filed on August 7, 2003 (certificate of mailing date) states that it is "[i]n response to the Office Letter mailed 2003, July 16." There is no mention of the interview summary of August 6, 2003, no discussion of the substance of the

interview, or statement that the reply filed with a certificate of mailing dated August 7, 2003, is in response to the interview. To this end, there is simply no indication from the paper filed that it was in any way intended to be a statement of the substance of the interview.

Simply put, the reply filed on August 7, 2003 (certificate of mailing date) was a reply to the non-final Office action mailed on July 16, 2003. The mere fact that the reply with the certificate of mailing dated August 7, 2003 was filed after the date the examiner's interview was held, and the Interview Summary mailed, does not, in itself, lead to a conclusion that the paper was filed in response to the Interview Summary in the absence of indicia on the paper itself that the paper filed with a certificate of mailing dated August 7, 2003, was, in fact filed in response to the Interview Summary.

As was stated in the decision mailed on July 11, 2006:

MPEP 711.03(c) states, a delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (A) the applicant's reliance upon oral advice from USPTO employees; or (B) the USPTO's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985). Additionally, a review of the paper filed with a certificate of mailing date of August 7, 2003, reveals that the paper does not indicate that it was filed in response to the Interview of August 5, 2003, but rather in response to the Office action mailed on July 16, 2003. As such, petitioner cannot plausibly claim, at this late date, that the paper with a certificate of mailing dated August 7, 2003, was filed in response to both the non-final Office action mailed on July 16, 2003, and the Examiner's interview held on August 5, 2003. It is further noted that petitioners' assertion that "[a]pplicants could not wait for receiving of the Interview Summary and reply to the Notice of Allowability separately" is unsupported because the Interview Summary was mailed with the Notice of Allowability, and a reply to each could have been filed concurrently.

In summary, the showing of record is that applicants did not file a response to the Interview Summary mailed on August 6, 2003.

Further, with regard to petitioners' argument that the Office had accepted certain papers from the applicant that were not signed by both *pro se* applicants, although the USPTO attempts to notify parties as to defective papers in order to permit timely refile, it has no obligation to do so. See In Re Columbo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994). Rather it is the applicants who are ultimately responsible for filing proper documents. Id.

While the Office is mindful that applicant is a *pro se* inventor, such does not excuse petitioner from compliance with Office laws and regulations. Petitioner was not forced, but rather made a conscious decision to prosecute the application *pro se*, and therefore must be held accountable for his actions, or lack thereof, before the Office. There are numerous resources available to petitioner, as have been available to others who have chosen this path of prosecution, to obtain the necessary information to prosecute the application before the Office.

In summary, the showing of record is that petitioner did not file a proper and timely reply to the Interview Summary mailed on August 6, 2003. As such, the application is properly held abandoned.

As petitioner has failed, despite repeated attempts, to provide any persuasive arguments meriting withdrawal of the holding of abandonment, the petition must be denied.

CONCLUSION

The prior decision, which refused to withdraw the holding of abandonment, has been reconsidered, and is affirmed.

Petitioner is not precluded from filing a petition to revive pursuant to 37 CFR 1.137. However, continued delay in filing such a petition, after this final agency action, may be determined to be intentional delay and may preclude revival of the application.

Telephone inquiries concerning this matter may be directed to
Senior Petitions Attorney Douglas I. Wood at (571) 272-3231.

A handwritten signature in dark ink, appearing to read "Charles Pearson", with a long horizontal flourish extending to the right.

Charles Pearson
Director
Office of Petitions